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Evaluation of the U.S. Department of Justice
Ameritech - Michigan
June 25, 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

FEDERAL COMMUNICATIONS COMMISSION
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Application of Ameritech Michigan
Pursuant to Section 271 of the
Telecommunications Act of 1996 to
Provide In-Region, InterLATA
Services in the State of Michigan

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CC Docket No. 97-137

EVALUATION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

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SUMMARY OF EVALUATION

Based on the record before us, Ameritech's application to provide in-region interLATA service in Michigan should be denied because Ameritech has not yet satisfied the requirements of Section 271 of the Telecommunications Act of 1996.

Ameritech has made significant and important progress toward meeting the preconditions for in-region interLATA entry under Section 271 in Michigan, and has satisfied many of those preconditions, but it has not yet complied with several of the requirements of the competitive checklist. Unbundled switching and unbundled transport are not available in a manner consistent with the 1996 Act and the Commission's regulations, and as a result, local competitors cannot freely combine network elements into a "network platform" and receive access charges in connection with their provision of local service. Ameritech's wholesale support processes, including OSS, have not been shown to be adequate to handle reliably the ordering and provisioning of significant quantities of demand for resold services and unbundled elements by local competitors, although Ameritech has taken the right steps toward establishing the means by which the adequacy of these systems could be resolved in the future and has made some progress toward effective ordering and provisioning of resold services and unbundled elements. Ameritech also has not provided trunking facilities of acceptable quality to ensure nondiscriminatory interconnection.

Granting interLATA entry to Ameritech in Michigan at this time also would be inconsistent with the Telecommunications Act's objective, embodied in the Department's

competitive standard, of ensuring that local markets are "fully and irreversibly open to competition." This standard focuses on opportunities for commercial entry to serve both business and residential customers, looking first at actual entry in order to demonstrate that the market is open and that enforceable benchmarks are in place. Local exchange competition in Michigan is still on a very small scale, and the areas in which Ameritech has not fully complied with the competitive checklist constitute tangible obstacles to the growth of local competition. In addition, Ameritech's lack of fully adequate performance measures and enforceable performance benchmarks suggests that the development of local competition in Michigan has not yet been shown to be irreversible. For these reasons, Ameritech's current Section 271 application in Michigan should be denied.

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EVALUATION OF THE
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Introduction

The United States Department of Justice, pursuant to Section 271(d)(2)(A) of the Telecommunications Act ("1996 Act" or "Telecommunications Act"),¹ submits this evaluation of the application filed by Ameritech Michigan ("Ameritech") on May 21, 1997 to provide in-region interLATA telecommunications services in the State of Michigan.²

¹ Pub. L. No. 104-104, 110 Stat. 56 (1996)(codified at 47 U.S.C. § 151 et seq.).

² Section 271(d)(2)(A) requires the Commission to consult the Attorney General on any Bell Operating Company ("BOC") application to provide in-region interLATA services under Section 271(c)(1) of the Telecommunications Act and also requires that the Commission give any written evaluation by the Attorney General "substantial weight" in its decision. The submission of this evaluation does not affect the independent enforcement responsibilities of the Department under the antitrust laws. See, e.g., United States v. R.C.A., 358 U.S. 334, 350 n.18 (1959). See also Section 610(b) of the 1996 Act, 110 Stat. 143.

The State of Michigan has been among the leaders in removing legal and economic barriers to local competition. In some urban areas of the state, new entrants have made notable progress, though local competition is still on a very small scale and has not yet reached many areas of the state. Significantly, this emerging local competition has revealed many practical difficulties in developing and implementing the complex processes that will be needed to support competition in an environment where entrants remain dependent on nondiscriminatory access and interconnection arrangements with a dominant incumbent local exchange carrier ("ILEC").

The U. S. Department of Justice ("the Department") set out in detail the standards and criteria that it will apply in evaluating applications under Section 271 of the 1996 Act in our previous filing opposing SBC's application to provide in-region interLATA services in Oklahoma.³ Applying those standards and criteria to Ameritech's Michigan application, we observe that through its ongoing efforts as well as through its cooperation with the Department, Ameritech has made significant progress toward satisfying the requirements of Section 271, and has already successfully fulfilled many of the 1996 Act's preconditions for in-region interLATA entry. Nevertheless, based on the record before us, we believe that the Commission should deny this application on the grounds that Ameritech has yet to make the necessary showings on two important requirements. First, it has not yet satisfied all fourteen points of the competitive checklist as set out in Section 271(c)(2)(B) of the 1996 Act, a conclusion also reached by the

³ Application of SBC Communications Inc. et al., Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region InterLATA Services in the State of Oklahoma, Evaluation of the United States Department of Justice, CC Docket No. 97-121 (May 16, 1997) ("DOJ Oklahoma Evaluation").

Michigan Public Service Commission ("MPSC"). And second, Ameritech has failed to show that its local markets in Michigan are "irreversibly opened to competition," the competitive standard used by the Department in evaluating Section 271 applications, which in turn means that granting this application would not be in the public interest.

I. The Requirements of Section 271 and the
 Competitive Objectives of the Telecommunications Act

Section 271 reflects Congress' commitment to the critically important goal of fully opening local telecommunications markets to competition. See Affidavit of Dr. Marius Schwartz ¶¶ 6-24, 154-159 ("Schwartz Aff."), Exhibit 1 to this Evaluation.⁴ It is widely understood that the incumbent Bell Operating Companies and other local exchange carriers ("LECs"), broadly viewed, still have virtual monopolies in local exchange services and switched access, and dominate other local markets as well.⁵ It is also widely understood that the BOCs' cooperation will be necessary, at least in the short and medium term, to assist in the development of meaningful local exchange competition, and accordingly, the 1996 Act conditioned BOC in-

⁴ This affidavit has already been filed with the Commission as an exhibit with the DOJ Oklahoma Evaluation in CC Docket No. 97-121, and so an electronic version is not provided again with this filing.

⁵ See, e.g., Federal Communications Commission, Telecommunications Industry Revenue: TRS Fund Worksheet Data, at Tables 2, 18, and 19 (Dec. 1996) ("FCC 1996 TRS Data"); Federal Communications Commission, Statistics of Communications Common Carriers, at Table 2.9 (1996) ("FCC 1996 Common Carrier Statistics"); and Schwartz Aff. ¶¶ 30-34, 38-39, 89 and Table 1. A more detailed analysis of data on revenues in local markets on a nationwide basis is contained in the DOJ Oklahoma Evaluation at 5 n.8.

region, interLATA entry on completion of a variety of steps designed to facilitate entry and foster competition in local markets. In order to ensure that the 1996 Act fulfilled its paramount goal of opening of local markets to competition, Congress chose to accept the requisite delay in achieving the benefits of BOC in-region interLATA entry, rather than allowing entry immediately or at a date certain.

Section 271 establishes the basic requirements for in-region interLATA entry.⁶ The first three such requirements -- satisfaction of the requirements of Section 271(c)(1)(A) ("Track A") or Section 271(c)(1)(B) ("Track B"), the competitive checklist, and Section 272 -- establish specific, minimum criteria that a BOC must satisfy in all cases before an application may be granted. In addition, Congress called for the exercise of discretion by the Commission in determining whether "the requested authorization is consistent with the public interest, convenience, and necessity." 47 U.S.C. § 271(d)(3)(C)(1997). Finally, Congress provided for a

⁶ Specifically, Congress required a BOC to show that:

(A) the petitioning Bell operating company has met the requirements of subsection (c)(1) of this section and -

(i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A) of this section, has fully implemented the competitive checklist in subsection (c)(2)(B) of this section; or

(ii) with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B) of this section, such statement offers all of the items included in the competitive checklist in subsection (c)(2)(B) of this section;

(B) the requested authorization will be carried out in accordance with the requirements of section 272 of this title; and

(C) the requested authorization is consistent with the public interest, convenience, and necessity.

47 U.S.C. § 271 (d)(3)(1997).

competitive evaluation of the application by the Department of Justice, "using any standard the Attorney General considers appropriate." 47 U.S.C. § 271(d)(2)(A)(1997) (emphasis added). In reaching its conclusion on a particular application, the Commission is required to give "substantial weight to the Attorney General's evaluation." 47 U.S.C. § 271(d)(2)(A)(1997).

II. Ameritech's Compliance with Track A (Facilities-Based Competitor)

Track A, under which Ameritech filed this application,⁷ requires a demonstration that the BOC "is providing access and interconnection," pursuant to binding agreements approved under Section 252, to "one or more unaffiliated competing providers of telephone exchange service ... to residential and business subscribers." Moreover, the competing providers must be providing local exchange service "exclusively" or "predominantly over their own telephone exchange service facilities." Section 271(c)(1)(A).

Ameritech contends that its application, based on its approved interconnection agreements with three operational providers, Brooks Fiber ("Brooks"), MFS and TCG, satisfies Track A.⁸ In our view, however, Ameritech can only rely on Brooks Fiber to satisfy Track A's

⁷ Ameritech cannot apply for Section 271 authority in Michigan under Track B, as the MPSC has refused to approve its Statement of Generally Available Terms and Conditions ("SGAT"), finding that competitive local exchange providers made timely requests for access and interconnection. Michigan Public Service Commission, In the Matter of the Application of Ameritech Michigan, Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, Consultation, at 2-4 (June 9, 1997) ("MPSC Consultation").

⁸ Brief in Support of Application by Ameritech Michigan for Provision of In-Region InterLATA Services in Michigan, CC Docket No. 97-137, at 2-3, 8-14 (May 21, 1997)

requirement of a residential local exchange service competitor. Brooks, MFS and TCG are all competing in some local exchange markets in Michigan for business customers, but only Brooks is actively competing in any residential local exchange markets in Michigan.⁹ Ameritech offers no contrary evidence, admitting that it is "unaware whether any of the Michigan customers of MFS or TCG subscribe to residential service." Ameritech Brief at 7. In the absence of residential service, MFS and TCG cannot be considered facilities-based providers that can be used to satisfy Track A of Section 271.

Turning then to Brooks, which is serving both residential and business customers, we observe that Brooks is not serving any of its local customers by resale of Ameritech's services. Ameritech Brief at 12. It provides significant switching and transport of its own, separate from Ameritech, to serve all of its customers, as well as a substantial share of its own local loops for both business and residential customers.¹⁰ While the issue of "predominance" -- as required by

("Ameritech Brief").

⁹ Both MFS/WorldCom and TCG have stated that they are not providing local exchange service to residential customers in Michigan. Comments of WorldCom, Inc. in Opposition to Ameritech Michigan Application for InterLATA Authority, CC Docket No. 97-137, at 4 (June 9, 1997) ("WorldCom Comments"); Comments of Teleport Communications Group, Inc., CC Docket No. 97-137, at 39 (June 10, 1997) ("TCG Comments"). The MPSC likewise found that "MFS and TCG apparently serve only business customers in Michigan at this time." MPSC Consultation at 10. See also DOJ Oklahoma Evaluation at 20-21 (certification and tariffs not sufficient to establish residential competition in absence of any customers or active marketing). Brooks, in contrast, does serve some residential customers in Grand Rapids and Holland, Michigan. Opposition of Brooks Fiber Communications of Michigan to Ameritech's Application, CC Docket No. 97-137, at 6 n.18 (June 10, 1997) ("Brooks Opposition").

¹⁰ See Ameritech Brief at 10; Brooks Opposition at 7, 9; and MPSC Consultation at 10.

Track A -- is necessarily one of degree, we believe that on the specifics of the facts presented, it is reasonable to conclude that Brooks is predominantly a facilities-based provider in Michigan for purposes of Track A.¹¹

This conclusion, however, is only the first step of the Section 271 inquiry.

III. Ameritech's Compliance with the Requirements of the Checklist

Section 271(c)(2)(A) requires that a BOC proceeding under Track A provide access and interconnection that meets the requirements of the fourteen-point "competitive checklist" set forth in Section 271(c)(2)(B), pursuant to "one or more agreements." The competitive checklist specifies a minimum set of facilities, services, and capabilities that must be made realistically available to competitors, thereby ensuring that a wide range of entry strategies are open to competitors as a practical matter.¹²

¹¹ Given our conclusion that Track A is satisfied on the basis of Brooks' own facilities, we need not consider Ameritech's suggestion that the leasing of a BOC's unbundled network elements should be considered to be a competitive local exchange carrier's ("CLEC's") facilities for purposes of Track A. See Ameritech Brief at 12-14.

¹² Many of the checklist items expressly require "nondiscriminatory" provision, and in addition the "nondiscriminatory" terms and conditions required by Section 251 apply both to the LECs' treatment of other competitors and to the LECs' treatment of their own affiliates, so that the LECs must provide unbundled elements at the same level of quality as they do for themselves, to the extent technically feasible. See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket Nos. 96-98 and 95-185, at ¶¶ 217-18 (footnotes omitted) (rel. Aug. 8, 1996) ("Local Competition Order"). Where a BOC relies on the use of "most favored nation" (MFN) clauses to meet checklist requirements and there has been substantial doubt as to what its MFN clauses actually permit, as here, the Commission should carefully scrutinize the BOC's interpretations to ensure both that they are adequate and that they remain fully enforceable after entry authority is granted. See

The 1996 Act provides an opportunity for state commissions to evaluate a BOC's compliance with the checklist. At the same time, the 1996 Act authorizes the Commission to make the final determination of checklist compliance.¹³ In the Department's view, the MPSC has raised valid concerns, which have been echoed by other state regulatory authorities in the Ameritech region -- namely, the Public Service Commission of Wisconsin ("PSCW"), in a final decision rejecting Ameritech's SGAT,¹⁴ and the Illinois Commerce Commission ("ICC"), in a

Affidavit of Theodore A. Edwards at Schedule 3 ("Edwards Aff."), attached to Ameritech Brief, Volume 2.3 (construing scope and permitted use of MFN clauses in Ameritech's agreement with TCG); Comments of MCI Telecommunications Corporation, CC Docket No. 97-137, at 9 (June 10, 1997) ("MCI Comments"); and Opposition of the Competitive Telecommunications Association, CC Docket No. 97-137, at 8 (June 10, 1997) ("CompTel Opposition") (arguing Ameritech MFN clauses do not confer true mix and match rights on competing carriers). The MPSC has discussed the difficulties experienced by TCG in seeking to use its MFN clause and Ameritech's further clarification of its present position allowing providers to opt to adopt the rates, terms and conditions of a single contract element rather than only being able to adopt contract sections as a whole, and has said that "application of these clauses will continue to be closely monitored." MPSC Consultation at 7.

¹³ Section 271(d)(3) requires the Commission to deny BOC applications unless "it" finds that the statutory requirements have been satisfied.

¹⁴ Ameritech filed its initial SGAT in Wisconsin on October 16, 1996. The PSCW opened Docket No. 6720-TI-120 in order to analyze the offering. On December 12, 1996, the PSCW issued its First Order finding Ameritech's SGAT deficient in many respects. Ameritech filed revised SGATs in January and March. The PSCW considered all of the issues noted in its First Order and held hearings on some of them, including whether Ameritech's OSS interfaces were "tested and operational." Testimony was submitted by Ameritech, CLECs and other interested parties, and PSCW staff, and cross-examination occurred. Commissioners attended the OSS hearings on March 31-April 1, 1997, heard oral argument on April 2, 1997, and orally decided on April 3, 1997, that Ameritech had not demonstrated that its systems were tested and operational. That decision was later memorialized in the final, written order of May 29, 1997, which rejected Ameritech's March SGATs and all prior SGATs for reasons which included lack of demonstrated OSS and lack of an unbundled common transport offering. Public Service Commission of Wisconsin, Matters Relating to Satisfaction of Conditions for Offering

proposed order by the Hearing Examiner¹⁵ -- and which suggest that Ameritech has yet to make the necessary showing that it has complied with the competitive checklist.

Although Ameritech is furnishing most items on the checklist to local competitors, the Department concludes that Ameritech has not yet satisfied the competitive checklist on several grounds, including the provision of unbundled switching, unbundled transport, interconnection trunking of adequate quality, and wholesale support systems including OSS.¹⁶

InterLATA Service (Wisconsin Bell, d/b/a Ameritech Wisconsin), Docket No. 6720-TI-120, Findings of Fact, Conclusions of Law and Second Order (May 29, 1997) ("PSCW Second Order"), Exhibit 2 to this Evaluation.

¹⁵ On August 26, 1996, the ICC issued an order establishing Docket No. 96-0404, an investigation into Ameritech's compliance with the requirements of Section 271. The ICC described 30 areas of inquiry, which were addressed by Ameritech, CLECs and other interested parties, and ICC staff in testimony, at hearing, and in briefs. On March 6, 1997, a Hearing Examiner's Proposed Order ("HEPO") was issued, which found Ameritech's compliance deficient in several respects, including the provision of OSS, unbundled transport and unbundled switching. This HEPO also expressed concerns about provisioning delays for unbundled loops. Ameritech then requested the opportunity to supplement the record, which was re-opened in the interests of completeness. Following additional rounds of testimony and hearing, a second HEPO was issued June 18, 1997, and then revised June 20, 1997. See Illinois Commerce Commission, Investigation Concerning Illinois Bell Telephone Company's Compliance with Section 271(c) of the Telecommunications Act of 1996, Docket No. 96-0404, Hearing Examiner's Revised Second Proposed Order (Revised June 20, 1997) ("ICC Second HEPO"), Exhibit 3 to this Evaluation. The only deficiencies cited in this HEPO are that Ameritech has not met the checklist items of unbundled switching and unbundled transport. This second HEPO is subject to briefs on exceptions, after which the matter will be submitted to the ICC.

¹⁶ Questions have been raised by various regulatory authorities in the Ameritech region about whether Ameritech is provisioning poles, ducts and conduits, and E911 services, on an adequate and nondiscriminatory basis. See MPSC Consultation at 34-36, 43-44; Public Utility Commission of Ohio, In the Matter of the Complaint of the Ohio Cable Telecommunications Association et al., Regarding Discriminatory Treatment of Pole Attachments by Cable Television Operators, Case No. 96-1027-TP-CSS, Opinion and Order, at 23, 25 (Apr. 17, 1997); Public Service Commission of Wisconsin, Matters Relating to Satisfaction of Conditions for Offering

A. **Ameritech Has Not Demonstrated that It Is Providing
Access to Local Switching and Transport As Required
by Sections 251 and 271 of the Telecommunications Act**

Section 271(c)(2)(B)(ii) sets forth the general requirement that the BOC's access and interconnection agreements or statement of terms include "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." In addition, the competitive checklist specifically requires the provision of "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services" (Section 271(c)(2)(B)(iv)), "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services" (Section 271(c)(2)(B)(v)), "[l]ocal switching unbundled from transport, local loop transmission, or other services" (Section 271(c)(2)(B)(vi)), and "[n]ondiscriminatory access to databases and associated signaling necessary for call routing and completion" (Section 271(c)(2)(B)(x)).

Ameritech's application acknowledges that it is not actually furnishing unbundled local switching to any of its local exchange competitors. Ameritech Brief at 15. Some potential competitors, including AT&T, MCI, and LCI, have sought extensive unbundled switching arrangements as part of their requests for interconnection agreements. Ameritech represents that

InterLATA Service (Wisconsin Bell Inc. d/b/a Ameritech Wisconsin), Docket No. 6720-TI-120, Findings of Fact, Conclusions of Law and Order, at 50 (Dec. 12, 1996) ("PSCW First Order"); and PSCW Second Order at 34. The Department does not have sufficient independent information at this time to conclude whether or not these checklist items are being satisfied in Michigan.

no CLEC has chosen to order unbundled local switching, but that it is making this item available through its interconnection agreements and would provide it if it received an order. In a situation where a BOC is not furnishing a checklist item due to the absence of current orders, it can still "provide" that item by making it available both as a legal matter (i.e., contractually through complete terms in binding approved interconnection agreements that comply with all applicable legal requirements) as well as a practical matter (i.e., it must stand ready to fulfill a competitor's request on demand). Based on this standard, the Department cannot conclude that Ameritech is yet "providing" the checklist elements of unbundled local switching and unbundled local transport.

At present, Ameritech is not "providing" unbundled local switching or unbundled local transport as either a legal or a practical matter to CLECs in Michigan. As a legal matter, Ameritech has refused to provide carriers purchasing unbundled switching with true shared local transport (or "common transport" as it is often described). In addition, Ameritech has, as a legal matter, not allowed users of unbundled local switching to collect the access charges for long distance service they provide through unbundled network elements, if the CLEC's calls are transported from an interexchange carrier's point of presence ("POP") to the unbundled switch over trunks that also carry Ameritech customers' calls. In our view, these restrictions are inconsistent with Ameritech's obligations under Sections 251 and 271 and the relevant orders of the Commission. Ameritech argues that these restrictions cohere with the Commission's Local Competition Order, explaining that it would drop them if the Commission rejects its position in a

pending motion for clarification and reconsideration. Moreover, Ameritech has offered to "true up" any balance of accounts between itself and a CLEC purchasing these items once the Commission has clarified the legal status of common transport, i.e., whether it is a required unbundled network element. Whatever the merits of these interim accommodations -- the need for which should be obviated once the Commission rules on the common transport issue -- the fact remains that, at this point, Ameritech still has not made the necessary showing that it possesses the technical capability of successfully provisioning unbundled local switching and transport. Given that fact, we conclude that Ameritech is not yet "providing" these items within the meaning of the checklist.

1. Ameritech Refuses to Provide Shared Local Transport

Ameritech has failed to satisfy the requirement that it provide local transport as required by the Commission's Local Competition Order. This failure stems from Ameritech's legal position that it is not required to provide "common transport" as well as dedicated transport. Ameritech has only recently begun to engage in inter-carrier testing of common transport as a network element, and, thus, at the present time is unable to demonstrate a technical ability to provide access to this network element. Since the provision of common transport requires network capabilities that are not used in connection with other network elements or functionalities, such a demonstration will be necessary before any determination could be made that Ameritech is "providing" common transport.

Ameritech's affiant Daniel J. Kocher describes the local transport options that Ameritech

is willing to sell to purchasers of unbundled switching. Affidavit of Daniel J. Kocher ¶¶ 65-68 ("Kocher Aff."), attached to Ameritech Brief, Volume 2.5. Under the first option, named Network Platform-UNE, competitors may purchase unbundled interoffice transport at Total Element Long Run Incremental Cost ("TELRIC")-based prices. Under this option, however, the unbundled local switching ("ULS") customer would not be able to have its calls routed over the same trunk groups that carry Ameritech's traffic. Rather, this option requires that such competitors establish their own separate routing tables to be placed in the switch, which must route the competitors' calls over circuits that are separate from the trunks carrying Ameritech's traffic. Ameritech claims that this arrangement satisfies the requirement for shared transport since such dedicated circuits could reside in the same cable sheathing or carrier system as Ameritech's facilities. But unless the CLECs' traffic is permitted to travel over the same individual circuits as the incumbent's traffic, the trunking efficiencies from the use of the same switch can not be achieved.

Ameritech argues that routing traffic over the same circuits amounts to "common transport" and that since this involves both transmission and switching it should be regarded as a "service" as opposed to a network element. Kocher Aff. ¶¶ 67-68. Thus, Ameritech offers a second local transport option to purchasers of unbundled local switching. This option, called Network Combination Transport Service, permits a competitor to combine unbundled switching with a wholesale usage service (the price of which is not based on TELRIC). Under this option, competitors are not entitled to collect originating or terminating access charges. Id.

As noted above, Ameritech views "common transport" as a wholesale service rather than an unbundled element, because, among other things, "common transport" involves the interaction of two network elements: switching and transport. This rationale, however, is not supported by the 1996 Act, the Commission's regulations, or the rulings of the MPSC.¹⁷ Section 251(c)(3) of the 1996 Act specifically provides that requesting telecommunications carriers may obtain unbundled network elements and that the incumbent LECs must provide them "in a manner that allows requesting carriers to combine such elements." Moreover, the Commission's implementing regulations that are in effect -- i.e., have not been stayed in judicial proceedings -- require that such combinations of elements be provided, stating that "[e]xcept upon request" the BOC cannot separate "requested network elements that the incumbent LEC currently combines." 47 C.F.R. § 51.315(a), (b) (1997). Thus, as the Commission has emphasized,¹⁸ the ability of new entrants to compete with incumbent LECs ("ILECs") by using combinations of network elements, including the ILEC's shared transport networks, is an important mode of entry provided by the 1996 Act that should increase the speed with which competitors can enter the market. The Commission's Local Competition Order specifically allowed new entrants to "purchase all interoffice facilities on an unbundled basis as part of a competing local network," or "combine its own interoffice facilities with those of the incumbent LEC."¹⁹ This requires BOCs

¹⁷ See MPSC Consultation at 38.

¹⁸ Local Competition Order at ¶ 441.

¹⁹ *Id.* In so doing, the Commission explicitly determined that it was necessary for new entrants to be able to take advantage of the economies of scale that exist in the local networks.

to provide what has often been referred to as the "network platform." Noting the competitive significance of the "network platform," both the MPSC and the PSCW have rejected Ameritech's refusal to provide common transport.²⁰

As outlined in Part V, the Department agrees that the "platform" concept provides an important mode of CLEC entry and, as both Ameritech and the CLECs have recognized, this concept is most feasibly based upon the use of common transport. Thus, unless the Commission decides in the pending motion for clarification on this issue that Ameritech is not obligated to provide common transport, Ameritech cannot receive Section 271 authority unless it makes common transport available, in conjunction with both unbundled switching and the "network platform," as both a legal and a practical matter.

See id. at ¶ 11.

²⁰ The MPSC also "determined on the issue of shared versus common transport that AT&T's proposal was appropriate and the prices resulting therefrom should apply." MPSC Consultation at 38 (citing November 26, 1996 Order in Case Nos. U-11151 and 11152). The PSCW also determined that "Ameritech's proposal only offers dedicated unbundled transport and does not offer shared unbundled transport as required by 47 CFR §51.319(d). . . . Shared transport must use Ameritech's routing tables and not require engineering or dedicated ports." PSCW Second Order at 44-46. In rejecting the argument that a network element must be a discrete facility that could be dedicated to a user, the PSCW invoked the Commission's concept of "functionality," see Local Competition Order at ¶ 258, explaining that the purchase of "shared facilities such as common transport" is "essentially purchasing access to a functionality of the incumbent's facilities on a minute-by minute basis." PSCW Second Order at 48. Accordingly, the PSCW found Ameritech's transport offering deficient and directed it to "offer shared transport with the meaning of shared transport being that it uses Ameritech's routing tables and it does not require separate engineering or dedicated ports." Id. at 49.

2. Ameritech Has Imposed Improper Restrictions on The Ability of
Unbundled Local Switching Customers to Collect Access Charges for
Calls Carried by Their Unbundled Elements

The Department also concludes that Ameritech has not provided access to the unbundled local switching element in accordance with the Commission's regulations because it has failed to clearly allow ULS purchasers to receive access charges. Like Ameritech's position on the "common transport" issue, Ameritech's legal position here is, in our view, not consistent with the 1996 Act's requirements as interpreted in the Commission's regulations. The Commission has ruled that purchasers of unbundled elements have the right to provide access to the customer served by those unbundled elements.²¹ 47 C.F.R. § 51.309(b) (1997). Moreover, the Commission's recent decision reforming access charges reaffirmed that ILECs may not collect such interstate access charges where the service is provided by purchasers of unbundled network elements. Access Charge Reform, Second Report and Order, CC Docket No. 96-262, at ¶ 337

²¹ Local Competition Order at ¶ 363 n.772; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Order on Reconsideration, CC Docket Nos. 96-98 and 95-185, FCC 96-325, at ¶ 11 (rel. Sept. 27, 1996) ("Thus, a carrier that purchases the unbundled local switching element to serve an end user effectively obtains the exclusive right to provide all features, functions, and capabilities of the switch, including switching for exchange access and local exchange service, for that end user."). In addition, the Commission's regulations provide that "[a] telecommunications carrier purchasing access to an unbundled network element may use such network element to provide exchange access services to itself in order to provide interexchange services to subscribers." 47 C.F.R. ¶ 51.309(b) (1997). See also 47 C.F.R. ¶ 51.307(c) (1997). This part of the Commission's rules was not subject to the temporary stay issued by the Court of Appeals.

(rel. May 21, 1997).²²

Ameritech describes the conditions under which it would permit purchasers of unbundled switching to collect access charges in the Kocher and Edwards Affidavits. Ameritech's position is that competitors purchasing the Network Combination- Common Transport Service would not be entitled to collect access charges.²³ This restriction appears to mean that such purchasers of unbundled switching will not be able to collect access charges for traffic originating or terminating on their line ports unless such traffic is also routed to a POP over trunks that do not also carry Ameritech subscribers' traffic. This position is apparently based on Ameritech's theory that the trunk port through which its access calls travel should be exclusively dedicated to Ameritech.²⁴ Under this approach, competitors are barred from collecting any of the access

²² In neighboring states where Ameritech has advanced its same arguments against the platform both Illinois and Wisconsin have also rejected these claims and have ordered that Ameritech permit purchasers of network elements to collect the relevant access charges. PSCW Second Order at 43-50; Illinois Commerce Commission, Investigation Concerning Illinois Bell Telephone Company's Compliance with Section 271(c) of the Telecommunications Act of 1996, Docket No. 96-0404, Hearing Examiner's Proposed Order, at 36 (Mar. 6, 1997) ("ICC First HEPO"). The second Illinois HEPO concludes that, since the date of the first HEPO in March 1997, the contested issues associated with access have been resolved by the Commission's access charge reform order. ICC Second HEPO at 77.

²³ Kocher Aff. ¶¶ 66, 68; Edwards Aff. ¶ 116.

²⁴ Kocher Aff. ¶¶ 67-69, 77-78. See Affidavit of Robert V. Falcone and Robert A. Sherry ¶ 72, attached to AT&T Comments, Exhibit J. In effect, it appears that Ameritech is asking that the Commission reverse its decision that the local switching element includes the "line side and trunk side facilities plus the features, functions, and capabilities of the switch." Local Competition Order at ¶ 412.

charges where Ameritech provides the transport segment.²⁵ This restriction (1) denies to entrants crucial economies of scale in the trunking network between the switch and the POP, and (2) effectively negates the Commission's policy of allowing competitors using unbundled network elements to compete for the provision of exchange access service. Thus, unless the Commission decides that Ameritech's restrictions on the receipt of access charges by ULS purchasers are appropriate, Ameritech must allow the purchasers of ULS to collect access charges without restriction in order to receive Section 271 authority.

As a practical matter, Ameritech's restrictions on the ability of ULS customers to self-provide or collect access charges effectively deter the purchase of ULS.²⁶ Accordingly, Ameritech cannot point to any actual commercial use to demonstrate that it would be able to provision the ULS element. In the case of ULS, it is important to observe actual commercial use, or at least convincing testing evidence, because this element requires significant network capabilities that are not used in the provision of other network elements. Thus, unless the Commission significantly narrows the ULS element from what the Department and several state regulatory commissions understand it to represent, Ameritech cannot be found to have made the

²⁵ Edwards Aff. ¶ 116.

²⁶ As the PSCW observed, "[a]ccess revenues constitute a significant portion of a local exchange carrier's total revenues. If competitors are unable to provide access services, and therefore do not have an opportunity to tap into this revenue stream, the competitor is unlikely to be able to succeed." PSCW Second Order at 59. The PSCW found that Ameritech's proposal for ULS would permit it to get "access revenues in all cases where access services are provided jointly." *Id.* at 60. Thus, it found this position "unreasonable and discriminatory" and in violation of §251(c)(3) of the 1996 Act. *Id.*

necessary showing that ULS is being "provided" as required by the checklist.

3. Ameritech Has Not Yet Demonstrated the Capability to Provide Unbundled Switching and Transport in a Reliable Manner.

In its application, Ameritech states that if it is ordered by the Commission to provide common transport as a network element it will do so in accordance with billing settlement procedures set forth in the Kocher Affidavit, at ¶¶ 70, 73, 77. These settlement procedures would be necessary because Ameritech has not yet developed the capability to measure and record the call data needed for the provision of common transport or to permit the CLECs to bill access charges. In addition, Ameritech proposes to offer a combination of local switching and transport with the capability to perform a "true up" that would account for the different revenue flows that would occur if the AT&T version of the platform were adopted by the Commission after it approved Ameritech's Section 271 application. Stated simply, this proposal, which would become effective on the date that Ameritech is authorized to provide interLATA services in Michigan, calls for Ameritech to bill CLECs for transport at the wholesale usage rate and collect the access revenue for itself, but to maintain the appropriate records of this usage and the relevant access charges until the Commission rules on the pending motion for clarification and reconsideration of Ameritech's position on interoffice transport. If Ameritech's position were to be rejected by the Commission, it would "true up" its balance of accounts with the CLECs by offering a credit for the access revenue and for the overcharges for transport. Ameritech further states that, at that time, it would begin developing a long-term solution for the appropriate billing

systems to allow CLECs to bill the appropriate access charges. Kocher Aff. ¶¶ 75-78. Whatever merits it might otherwise have, this "true-up" proposal still does not deal with the other critical issue here -- i.e., Ameritech's failure to demonstrate its technical ability to provide this element.

In order to provide new entrants with a combination of local switching and transport as required by the Commission's regulations, Ameritech will have to configure its switches and support systems in a manner that is not used for its own services or for the resale of its services. In addition, it will have to establish systems and procedures for the ordering and provisioning of these elements. Ameritech has not yet demonstrated that it possesses the technical capability to do so in a reliable, commercially acceptable manner. Ameritech has, however, begun a technical trial to provide evidence that it can provision these elements.

To demonstrate that it will eventually be in a position to provide shared transport and to allow ULS purchasers to bill access if ordered to do so, Ameritech's application includes an outline of an ongoing technical trial with AT&T. As described in the Affidavit of Daniel J. Kocher,²⁷ this trial would proceed in two phases. The first phase of the trial would employ a single switch in Chicago and would involve the receipt of orders from AT&T for 20 lines using the EDI interface.²⁸ The single switch trial is intended to test the ordering process and several functions of the switch which are needed for the platform, such as customized routing and the recording of call detail needed for the platform customer to bill end users but not other carriers.

²⁷ Kocher Aff. ¶¶ 71-74.

²⁸ The test plan for phase one is Attachment 7 to the Kocher Affidavit.